Kartigeyan a/l Krishnan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–262 OF 2009
SULONG MATJERAIE, SYED AHMAD HELMY AND MOHTARUDIN BAKI JJCA
20 MARCH 2012

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Criminal Procedure — Defence — Accused remaining silent when defence called — Accused not calling any witnesses on his behalf — Whether prosecution's evidence unchallenged — Whether court had no choice but to convict — Whether possibility others could have been involved in the crimes created reasonable doubt that accused was perpetrator of offences — Whether fact accused was aged 18 years 11 months at time of murder and rape could absolve him of blame

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The appellant ('accused'), who had raped and murdered a 27-year-old girl ('the deceased') was sentenced by the High Court to death for the murder and given a sentence of 20 years' jail plus 15 strokes of the rotan for committing the rape. According to the prosecution's evidence the deceased worked in a fast-food outlet in Singapore and she and a work colleague ('SP10') were in a van driven by the accused on the way home after work on the night before the offences were committed. SP10 had testified that after she had been dropped off at a bus stop, the deceased was the only passenger left in the van. The deceased was found dead in an oil palm plantation the following morning. She had been raped, there were multiple injuries on her body and the cause of death was head injury due to blunt trauma. At the close of the prosecution's case, the trial judge held a prima facie case on the murder and rape charges had been made out and the accused's defence was called. As the accused opted to remain silent and call no witnesses on his behalf, the court proceeded to convict and sentence him on both charges. In his appeal to the Court of Appeal against the convictions and sentences, the accused submitted that (i) since the testimony of the forensic pathologist did not rule out the possibility that more than one assailant could have caused the injuries suffered by the deceased, a prima facie case on the murder charge had not been made out (ii) the DNA evidence adduced did not conclusively point to the accused as the perpetrator of the offences and (iii) at the time the offences were committed the appellant had just passed the age of 18 years.

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Held, dismissing the appeal and affirming the convictions and sentences:

(1) In evaluating the circumstantial evidence of the case the trial judge had taken into consideration the circumstances prior to and after the commission of the crimes. He took into consideration the evidence of the

forensic pathologist ('SP6') and of SP 10 and the DNA evidence before concluding that the possibility of others being involved in the crimes did not create any reasonable doubt in his mind that it was the appellant who was the perpetrator of the crimes. There was no error on the part of the trial judge in his conclusion (see paras 15–16).

(2) The findings and conclusions of the trial judge on the DNA evidence was more than amply justified by the available evidence and there was no room for appellate interference (see para 23).

(3) The fact the appellant was aged approximately 18 years and 11 months at the time of commission of the offence was a ground that could be dismissed outright as the age factor did not exculpate or dismiss the accused's culpability for the offences with which he was charged (see para 29).

(4) In the light of the trial judge's finding that the prosecution had successfully proven a prima facie case and upon the accused electing to remain silent the court was put in a situation where it had no choice but to convict the accused on the charges as he had failed to rebut the evidence adduced by the prosecution. The record absolved any error on the part of the trial judge (see paras 25 & 28).

[Bahasa Malaysia summary

Perayu ('tertuduh'), yang merogol dan membunuh wanita berumur 27 tahun ('si mati') dihukum mati oleh Mahkamah Tinggi kerana membunuh dan dihukum 20 tahun penjara tambah 15 sebatan rotan kerana merogol. Menurut keterangan pendakwaan si mati bekerja di sebuah kedai makanan segera di Singapura dan dia dan rakan sekerja ('SP10') berada di dalam van yang dipandu oleh tertuduh dalam perjalanan pulang selepas kerja pada malam kesalahan tersebut dilakukan. SP10 memberi keterangan bahawa selepas dia diturunkan di perhentian bas, si mati adalah satu-satunya penumpang yang masih berada di dalam van tersebut. Si mati didapati mati di ladang kelapa sawit pagi berikutnya. Dia telah dirogol, terdapat kecederaan berganda ke atas tubuh badannya dan punca kematian adalah kecederaan kepala akibat trauma tumpul. Di akhir kes pendakwaan, hakim yang bijaksana memutuskan kes prima facie ke atas tuduhan-tuduhan bunuh dan rogol yang dibuat dan pembelaan tertuduh dipanggil. Memandangkan tertuduh memilih untuk berdiam diri dan tidak memanggil saksi-saksi bagi pihaknya, mahkamah meneruskan untuk menyabit dan menghukum dia atas kedua-dua tuduhan. Dalam rayuannya ke Mahkamah Rayuan terhadap sabitan dan hukuman, tertuduh berhujah bahawa (i) memandangkan keterangan patologi forensik tidak menunjukkan kemungkinan bahawa lebih daripada satu penyerang yang menyebabkan kecederaan yang dialami oleh si mati, kes prima facie atas tuduhan bunuh tidak dibuat (ii) keterangan DNA yang dikemukakan tidak secara konklusif menunjukkan yang tertuduh sebagai pelaku kesalahan dan

(iii) pada masa kesalahan tersebut dilakukan perayu baru sahaja melepasi umur 18 tahun.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Dalam menilai keterangan keadaan kes hakim perbicaraan telah mengambil kira keadaan sebelum dan selepas pelakuan jenayah tersebut. Beliau mengambil kira keterangan patologi forensik ('SP6') dan SP10 dan keterangan DNA sebelum memutuskan kemungkinan orang lain terlibat di dalam jenayah tersebut tidak membentuk apa-apa keraguan munasabah di dalam fikirannya bahawa perayulah pelaku jenayah tersebut. Tidak terdapat kesilapan oleh pihak hakim perbicaraan dalam keputusannya (lihat perenggan 15–16).

(2) Dapatan dan kesimpulan hakim perbicaraan atas keterangan DNA dijustifikasi dengan jelas oleh keterangan yang ada dan tidak terdapat ruang untuk campur tangan mahkamah rayuan (lihat perenggan 23).

(3) Fakta bahawa perayu berusia kira-kira 18 tahun dan 11 bulan pada masa pelakuan kesalahan tersebut adalah alasan yang boleh ditolak dengan sekeras-kerasnya memandangkan faktor umur tidak membebaskan atau menolak kebersalahan tertuduh untuk kesalahan-kesalahan tersebut yang mana dia dituduh (lihat perenggan 24).

(4) Berdasarkan dapatan hakim bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie dan atas pilihan tertuduh untuk kekal berdiam diri, mahkamah terletak dalam keadaan di mana ia tidak adalah pilihan tetapi untuk menyabit tertuduh atas tuduhan-tuduhan memandangkan dia gagal untuk mematahkan keterangan yang dikemukakan oleh pihak pendakwaan. Rekod membebaskan apa-apa kesilapan oleh pihak hakim perbicaraan (lihat perenggan 25 & 28).]

Notes

For cases on accused remaining silent when defence called, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1853–1855.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Chandmal & Anor v State of Rajasthan AIR 1970 SC 917, SC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
PP v Saimin & Ors [1971] 2 MLJ 16; [1971] 1 LNS 115 (refd)

Legislation referred to

Criminal Procedure Code ss 180, 182A

Appeal from: Criminal Trial No 45–25 of 2007 (High Court, Johor Bahru)

(Veizay & Co) for the appellant.
Ian Shang Kuan Chou Chuen (Johor State Legal Advisor's Office) for the respondent.

Syed Ahmad Helmy JCA:

[1] The appellant herein was charged in the High Court at Johor Bahru with the rape and murder of one Choo Meng Luh ('the deceased') on 25 December 2006 and the charges reads as follows:

> First Charge:
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> Bahawa kamu pada 25.12.2006, antara jam lebih kurang 1.30 pagi hingga 8.15 pagi, di kawasan semak Ladang Kelapa Sawit Hock Lam, Jalan Pekan Lima ke Pekan Gelang Patah, Gelang Patah, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'azim, telah melakukan kesalahan membunuh dengan menyebabkan kematian ke atas Choo Meng Luh, KP No. 850622-01-5292, oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.
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> Second Charge:
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> Bahawa kamu pada 25.12.2006, antara jam lebih kurang 1.30 pagi hingga 8.15 pagi, di kawasan semak Ladang Kelapa Sawit Hock Lam, Jalan Pekan Lima ke Pekan Gelang Patah, Gelang Patah, di dalam daerah Johor Bharu, di dalam Negeri Johor Darul Ta'azim, telah merogol seorang perempuan Cina bernama Choo Meng Luh, KP No. 850622-01-5292, oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan.

[2] In support of its case the prosecution called a total of 15 witnesses, at the end of which the learned trial judge found that a prima facie case against the appellant on both the charges have been successfully proven by the prosecution and called upon the appellant to enter his defence. The appellant opted to remain silent and did not call any other witnesses. The learned trial judge found him guilty on both charges. He was convicted and sentenced to death in respect of the murder charge and to 20 years imprisonment and 15 strokes of the cane in respect of the rape charge. This is his appeal against both the convictions and sentences.

[3] In his grounds of judgment which appears at pp 140–180 of vol 1 of the record of appeal the learned trial judge laid out the essential elements that needs to be established for the respective offences of murder and rape.

[4] He detailed the evidence adduced by the prosecution in support of the charges and conducted a maximum evaluation of same. A

[5] The prosecution's evidence establishes that the deceased was working in a Burger King restaurant in Singapore together with SP10. On the 24 December 2006 at about 11.45pm to 12am the deceased and SP10 took a van bearing registration number JCB 154 driven by the appellant from Singapore to go home. According to SP10 the deceased was the only passenger left in the van driven by the appellant after she was dropped off at a bus stop. That was the last time SP10 saw the deceased alive. B C

[6] SP9, the mother of the deceased testified that the last time she saw the deceased was on 24 December 2006 when she left for work at 11am.

[7] The deceased was found dead at Ladang Kelapa Sawit Hock Lam by SP4 and his friends whilst they were on their way for fishing at a fishing pond at about 8am on 25 December 2006. D

[8] The deceased's body was identified by her mother SP9 at the Hospital Sultanah Aminah, Johor Bahru and the photograph of the deceased. E

[9] The forensic pathologist, Dr Mohamed Aznool Hardy bin Hj Ahsorori (SP6) who examined the deceased's body gave testimony as to the injuries inflicted and the cause of death. SP6 testified that the deceased suffered multiple injuries on the face and head, the chest and abdomen, the upper and lower limbs, the genitalia and in the internal head. Bite marks were found on both lateral and tip of the victim's tongue. The deceased also sustained multiple soft tissue injuries on the body with pattern consistent with that due to direct blow impact occasioned by the usage of heavy and hard object. He concluded that the cause of death was head injury due to blunt trauma. His estimation as to the time of death was between 11.40pm on 24 December 2008 to 3.40am on 25 December 2006. F G

[10] The chemist Mohd Izuan bin Othman ('SP7') gave evidence as to the DNA analysis conducted by him and the results with regard to the relevant exhibits produced by the prosecution. H

[11] The High Court having considered the oral and documentary evidence and upon conducting a maximum evaluation of same ruled that the prosecution had made out a prima facie case at the close of its case. The learned trial judge accepted the evidence of the prosecution's witnesses particularly SP9, SP10, SP6 and SP7 in arriving at his conclusion that a prima facie case has been made out warranting the calling of the defence. The record shows that the appellant chose to remain silent after the three alternatives were explained to I

him and after consultation with his counsel. The learned trial judge upon the appellant's exercise of the option of remaining silent accordingly convicted and sentenced the appellant on both the charges.

[12] The appellant through his counsel formulated II grounds of appeal as appears in the memorandum of appeal but learned counsel for appellant advanced his challenge under three heads, namely:

(a) in the light of the prosecution's evidence of the possibility of there being more than one assailants a prima facie case on the charge of murder has not been made out;

(b) the DNA evidence adduced does not conclusively point to the appellant being the perpetrator of the offences for which he is charged; and

(c) at the time of the commission of the offence on 25 December 2006 the appellant has just passed the age of 18 years having been born on 18 January 1988.

[13] On the first head of challenge learned counsel for the appellant directed our attention to the testimony of the forensic pathologist SP6 that he cannot rule out the possibilities of more than one assailants causing the injuries suffered by the deceased and by reason thereof it has negatived the establishment of a prima facie case by the prosecution.

[14] The determination of such an issue cannot be answered by viewing it in the restrictive context of the presence of more than one person. The circumstances of the case and the forensic evidence must be looked into in arriving at a determination of the issue. It is not in dispute that the prosecution's case rests entirely on circumstantial evidence. At this juncture it is appropriate to recapitulate the three tests applicable in relation to circumstantial evidence as propounded by the Supreme Court of India in *Chandmal & Anor v State of Rajasthan* AIR 1970 SC 917 and approved by our Federal Court in *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1 at p 9 (MLJ); ; [2011] 1 CLJ 805; p 815 (CLJ)namely:

> Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances taken cumulatively, should form a chain to complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt.

[15] In evaluating the circumstantial evidence of the case the learned trial

judge took into consideration the circumstances prior and post the crime. He took into consideration the evidence of SP6, SP10 and the DNA evidence before concluding that the possibility of others being involved in the crime did not create any reasonable doubt in his mind that it was the appellant that was the perpetrator of the crime for which he was charged. In support of his conclusion the learned trial judge applied the principle as stated by Sharma J in *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16; [1971] 1 LNS 115 approving Denning MR in *Miller v Minister of Pensions* [1947] 2 All ER 372. His conclusion is found at pp 165–166 of the appeal record where he stated:

> Perkara yang penting yang perlu diberi perhatian adalah cadangan-cadangan tersebut hanyalah andaian semata-mata, tanpa apa-apa sokongan atau bukti. Pada hemat mahkamah ini, andaian-andaian semata-mata bahawa kemungkinan terdapat lebih daripada seorang yang terlibat menyerang simati adalah merupakan 'remote possibility' dan 'fanciful possibility.' Itu sebabnya andaian tersebut tidak langsung menimbulkan keraguan munasabah kes pendakwaan di peringkat ini. Dengan mempertimbangkan dan memeriksa setiap satu daripada keterangan di dalam kes ini dan keseluruhannya dan setiap sudut, keterangan yang didapati oleh mahkamah ini tidak meninggalkan apa-apa persoalan yang tidak berjawab.
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> Setelah meneliti semua keadaan kes ini, mahkamah ini mendapati bahawa hanya konklusi berikut sahaja yang boleh dibuat: semua kecederaan yang dialami oleh simati termasuk juga kecederaan di kepala yang menjadi punca kematian simati adalah disebabkan oleh, atau adalah hasil daripada perbuatan tertuduh sendiri.

[16] We do not find any error on the part of the learned trial judge in his conclusion aforesaid which we accordingly affirm.

[17] We will now address the challenge of learned counsel for the appellant that the DNA (abbreviation for deoxyribonucleic acid) evidence adduced does not conclusively point to the appellant being the perpetrator of the offences charged.

[18] We had in dismissing the appellant's first ground of challenge aforesaid upheld the learned judges reliance on the DNA evidence as a circumstance pointing towards the appellant's guilt. We shall now elaborate on the DNA evidence issue.

[19] DNA evidence is now widely used in the field of criminal law. DNA evidence involves an analysis of the process to determine the statistical likelihood that the sample of material from which it was taken came from a particular person.

[20] DNA is a complex molecule in the form of a double helix. DNA analysis relies on the fact that different regions (or loci) contain repeated blocks of

material known as 'alleles'. A person's DNA profile is currently built up by reference to the alleles present at the chosen ten loci and the sex indicator.

[21] The learned trial judge in his written grounds was satisfied that the government chemist En Mohd Izuan bin Othman (SP7) gave detailed evidence as to the examination and analysis conducted on all the exhibits forwarded to him. This was borne out at pp 150–151 of the appeal record:

> Barang kes kemudiannya telah dihantar ke Jabatan Kimia, Petaling Jaya dan diterima oleh pakar DNA En Mohd Izuan bin Othman iaitu SP7. SP7 telah menjalankan analisa barang kes termasuk P40A, P50A, P50B, P51A, P51B dan P55A.
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> Perbandingan keputusan analisis DNA yang dijalankan oleh SP7, antara lain adalah bahawa profil DNA yang diperolehi daripada air mani pada kapas kesat E26a (P51A) dan E26b (P51B) adalah berpadanan antara satu sama lain dan ia berpadanan dengan profil DNA yang diperolehi daripada specimen kesan darah JK 1 (P55A), menunjukkan bahawa DNA yang dikenalpasti berasal daripada sumber yang sama.
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> Perlu ditegaskan dan diberi penekanan bahawa air mani pada P51A dan P51B diambil oleh SP6 daripada bahagian vagina si mati. Manakala specimen darah P55A adalah specimen darah tertuduh.
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> Seterusnya, SP7 telah menyatakan bahawa kebarangkalian seseorang individu lain (yang dipilih secara rawak dan tidak mempunyai kaitan kekeluargaan) mempunyai profil DNA yang berpadanan dengan profil DNA tersebut di lima belas lokus genetic, adalah dijangka lebih kurang 1 dalam 120 quintillion berdasarkan pengkalan data STR penduduk Malaysia berketurunan India.
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> DNA ialah nama singkatan bagi deoxyribonucleic acid, la adalah sebatian kimia kompleks yang ditemui di dalam nucleus setiap sel dan membawa maklumat gen seseorang. Semua sel dalam badan seseorang mempunyai DNA yang sama. DNA bagi setiap seorang kecuali kembar yang serupa adalah unik. Pemprofilan DNA digunakan untuk perbandingan iaitu menentukan samada bahan bukti biologi yang ditemui di vagina si mati mempunyai hubungkait dengan tertuduh. Replikasi turutan DNA yang terdapat dalam specimen DNA dilakukan dengan kaedah PCR.

[22] In accepting the evidence of SP7 to attach culpability on the appellant on both charges the learned trial judge had this to say at pp 152–154:

> Berbalik kepada kes ini, mahkamah mendapati SP7 telah memberi keterangan secara terperinci mengenai pemeriksaan dan analisa yang beliau lakukan terhadap semua barang kes. Mahkamah mendapati beliau merupakan seorang yang mempunyai kelayakan dan berpengalaman luas dalam bidang analisia DNA. Mahkamah menerima SP7 sebagai seorang pakar DNA. SP7 telah menerangkan di mahkamah prosedur dan proses serta alat-alat saintifik yang digunapakai dalam menjalankan analisa tersebut. Tiada apa-apa keterangan lain yang membantah yang telah dikemukakan oleh pihak pembelaan untuk mencabar keterangan SP7 ini.

Malahan, pihak pembelaan tidak mencabar dengan serius kepakaran dan keterangan SP7. Tiada sebab bagi mahkamah ini menolak keterangan SP7 dan laporan DNA beliau iaitu P63. Pendapat SP7 adalah pendapat seorang pakar yang disokong oleh alasan-alasan saintifik yang diberikan olehnya. Dengan yang demikkian, mahkamah menerima keterangan SP7 dan laporan lengkap mengenai ujian DNA, P63.

Dengan yang demikian, keterangan DNA ini secara terus mengkaitkan tertuduh kepada pertuduhan pertama dan juga pertuduhan kedua tersebut. Pertuduhan kedua akan dibincangkan kemudian. Tetapi memadai di peringkat ini mahkamah memutuskan bahawa air mani tertuduh didapati dalam kemaluan si mati. Berdasarkan keterangan SP6, kesan kecederaan pada bahagian genitalia menunjukkan bahawa hubungan seks dilakukan oleh tertuduh ke atas si mati tanpa kerelaan. Mahkamah mendapati bahawa kecederaan pada bahagian genitalia tersebut dilakukan oleh tertuduh. Seperti yang telah dinyatakan di atas, kesimpulan yang tidak dapat dibendung adalah tertuduh juga orang yang mendatangkan atau menyebabkan kecederaan-kecederaan pada tubun badan si mati termasuk juga yang menyebabkan kematian oleh kerana 'head injury due to blunt truma.' Ini adalah kerana seperti yang dijelaskan oleh SP6 kesan-kesan kecederaan pada bahagian genitalia telah dialami pada tempoh masa yang sama dengan kecederaan-kecederaan lain.

[23] From his analytical and well reasoned judgment, the trial judge was impressed with the academic qualifications, experience and credentials of SP7. The tests conducted and the methods used by SP7 in conducting the DNA analysis was in accordance with international standards and the results obtained were accurate. The findings and conclusions of the learned trial judge on the DNA is more than amply justified by the available evidence and there is no room for appellate interference. This ground of challenge must surely fail as having no merits.

[24] The third ground of challenge pertaining to the appellant's age of approximately 18 years and 11 months at the time of the commission of the offence can be dismissed outright as the age factor does not exculpate or dismissed the appellants culpability for the offence charged.

[25] In the light of the learned trial judge's finding that the prosecution has successfully proven a prima facie case and upon the appellant electing the exercise his right to remain silent the question arises whether the learned trial judge erred in convicting the accused.

[26] In convicting the appellant the learned trial judge had at the forefront of his mind the procedure enshrined in s 182A of the Criminal Procedure Code whereby he must consider all the evidence adduced before him and decide whether the prosecution has proved its case beyond reasonable doubt. The learned trial judge in concluding that a prima facie case has been made out had

relied on the maximum evaluation principle as laid down in the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65. The learned trial judge also appraised himself of the steps to be taken in dealing with the question as to the position of law at the end of the prosecution's case as laid down by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 where the court made the following pronouncements:

(a) in deciding whether a prima facie case has been established under the new s 180 of the CPC, a maximum evaluation of all the evidence adduced by the prosecution must be done and a prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by evidence in rebuttal;

(b) *if the evidence is unrebutted. and the accused remains silent, he must be convicted.* Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain silent, which if answered in the affirmative, means that a prima facie case has been made out; and

(c) whenever the accused has chosen to remain silent, there is no necessity to re-evaluate the evidence to determine whether there is a reasonable doubt in the absence of any further evidence.

[27] The legal position as it stands is that when the appellant elects to remain silent, the court is put in a situation where it has no other choice but to convict the appellant on the charges as the appellant had failed to rebut the evidence adduced by the prosecution's witnesses.

[28] The record absolves any error on the part of the learned trial judge.

[29] For the reasons above stated we find that the convictions are safe and accordingly dismiss the appeal. The convictions recorded and the sentence meted out by the learned trial judge on both charges are affirmed.

Appeal dismissed and convictions and sentences affirmed.

Reported by Ashok Kumar